86-123

Supreme Court, U.S.
FILED
JUL 11 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

STATE OF ILLINOIS,

Petitioner,

vs.

RICHARD STACK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

NEIL F. HARTIGAN,
Attorney General
State of Illinois
MARK L. ROTERT,
Assistant Attorney General
100 West Randolph Street
Suite 1200
Chicago, Illinois 60601

Attorneys for Petitioner.

RICHARD M. DALEY
State's Attorney
Cook County, Illinois,
500 Richard J. Daley Center
Chicago, Illinois 60602
JOAN S. CHERRY,*
THOMAS V. GAINER, Jr.,
INGE FRYKLUND,
Assistant State's Attorneys
Of Counsel

*Attorney of Record.
(312) 443-5496

QUESTIONS PRESENTED

1.

Whether, where defendant relies solely on the defense that he was totally out of contact with reality at the time of the murders and introduces evidence of his irrational statements during the three-hour period immediately afterwards, the State may introduce rebuttal evidence that defendant conducted a lucid conversation concerning the scope of his Miranda rights during the middle of this time period.

2.

Whether, if the introduction of such evidence is error, it is harmless error.

3.

Whether this Court's decision in Wainwright v. Greenfield, 106 S. Ct. 634 (1986), interpreted as imposing a blanket rule that the introduction of any response associated with the Miranda warnings on the question of sanity constitutes automatic reversible error, should be applied retroactively.

TABLE OF CONTENTS

	PAGE
Questions Presented	i
Table of Contents	ii
Table of Authorities	iv
Opinion Below	2
Jurisdiction	3
Constitutional Provision Involved	4
Statement of the Case	5
Reasons for Granting the Writ	11

I.

UNDER THE STANDARDS OF DOYLE V. OHIO AND WAINWRIGHT V. GREENFIELD, EVIDENCE OF DEFENDANT'S LUCID CONVERSATION CONCERNING HIS MIRANDA RIGHTS WAS PROPERLY ADMITTED IN REBUTTAL TO COUNTER HIS INTRODUCTION OF TESTIMONY REGARDING HIS BIZARRE BEHAVIOR IMMEDIATELY BEFORE AND AFTER THE MIRANDA WARNINGS AS EVIDENCE THAT HE WAS TOTALLY OUT OF CONTACT WITH REALITY AT THE TIME OF THE MURDERS A FEW HOURS EARLIER.

II.

ANY ERROR IN THE INTRODUCTION OF DEFENDANT'S QUESTIONS ABOUT HIS MIRANDA RIGHTS WAS HARMLESS.

III.

WAINWRIGHT V. GREENFIELD SHOULD NOT BE APPLIED RETROACTIVELY TO REVERSE THE OUTCOME OF A TRIAL CONDUCTED FOUR YEARS EARLIER.

Conclusion..... 40

Appendix — Opinion of the Supreme Court of Illinois in People v. Stack..... 41

TABLE OF AUTHORITIES

CASES	PAGE
Anderson v. Charles, 447 U.S. 404 (1980).....	34
Chapman v. California, 386 U.S. 18 (1967).....	33
Commonwealth v. Mahdi, 388 Mass. 679, 448 N.E.2d 704 (1983).....	18
Donnelly v. DeChristoforo, 416 U.S. 637 (1974).....	32
Doyle v. Ohio, 426 U.S. 610 (1976).....	12 passim
Edwards v. Arizona, 451 U.S. 477 (1981).....	17,27, 36
Fletcher v. Weir, 455 U.S. 603 (1980).....	16,34
Greenfield v. Wainwright, 741 F.2d 329 (11th Cir. 1984), aff'd, Wainwright v. Greenfield, 106 S. Ct. 634 (1986).....	17,19, 23,30
Harris v. New York, 401 U.S. 222 (1971).....	23,38
Jenkins v. Anderson, 447 U.S. 231 (1980).....	16,34
Johnson v. New Jersey, 384 U.S. 719 (1966).....	36
Miranda v. Arizona, 384 U.S. 436 (1966).....	11,22, 29,33,35
Oregon v. Hass, 420 U.S. 714 (1975).....	23,38
People v. Clifford Anderson No. 56043 (June 30, 1986).....	39
People v. Gold, 38 Ill. 2d 510, 232 N.E.2d 702 (1967).....	15

CASES PAGE

People v. Stack, 128 Ill. App. 3d 611, 470 N.E.2d 1252 (1st Dist. 1984)..... 5,21

Rhode Island v. Innis, 446 U.S. 291 (1980)..... 22

Schmerber v. California, 384 U.S. 757 (1966)..... 21

Shea v. Louisiana, 105 S.Ct. 1065 (1985)..... 36

Solem v. Stumes, 465 U.S. 638 (1984)..... 36

South Dakota v. Neville, 459 U.S. 553 (1983)..... 21

Stovall v. Denno, 388 U.S. 293 (1967)..... 35,36

Sulie v. Duckworth, 689 F. 2d 128 (7th Cir. 1982)..... 15

Tague v. Louisiana, 444 U.S. 469 (1980)..... 22

United States v. Emery, 682 F. 2d 493 (5th Cir. 1982)..... 18

United States v. Johnson, 457 U.S. 537 (1982)..... 35,36

United States v. St. Pierre, 132 F. 2d 837 (1942)..... 23

United States ex rel. Miller v. Greer, 789 F. 2d 438 (7th Cir. 1986)..... 32

Wainwright v. Greenfield, 106 S. Ct. 634 (1986)..... 3 passim

STATUTORY PROVISIONS

Ill. Rev. Stat. (1981) ch. 38, par. 3-2..... 14

Ill. Rev. Stat. (1981) ch. 38, par. 6-2..... 6,14

Ill. Rev. Stat. (1981) ch. 38, par. 6-4..... 14

MISCELLANEOUS

2 Wigmore, Evidence (Chadbourne rev. 1979)..... 15

NO.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

STATE OF ILLINOIS,

Petitioner,

vs.

RICHARD STACK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

Petitioner, the State of Illinois, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of Illinois, which was entered on May 12, 1986.

OPINION BELOW

The opinion of the Supreme Court of Illinois, to be published as People v. Stack, 112 Ill.2d ___ (1986), is reproduced in Appendix A to this Petition.

JURISDICTION

The opinion, order and judgment of the Supreme Court of Illinois were entered on May 12, 1986. This Petition for a Writ of Certiorari is filed within 60 days of that date. United States Supreme Court Rule 20(1). The decision of the Illinois Supreme Court was explicitly based on federal constitutional law, in particular on the due process clause of the Fourteenth Amendment and the decision of this Court in Wainwright v. Greenfield, 106 S.Ct. 634 (1986). Accordingly, the jurisdiction of this Court is invoked under 28 U.S.C. sec. 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution-Fourteenth Amendment (Section 1)

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Defendant Richard Stack was charged by indictment with the May 11, 1980 murders of his wife, Carol, and his 13-month old son, Richard Jr. He admitted the killings, and defended "completely and totally" (R. 8) on grounds of insanity, claiming that at the time of the murders he experienced a "major break with reality" (R. 635), and thought he was killing two demons. (R. 637) A jury rejected his defense, and in March 1982 he was found guilty on both counts of murder, and sentenced to two concurrent natural life terms. His conviction was reversed and remanded on November 5, 1984 by the Illinois Appellate Court, which held that the State violated defendant's Fifth and Fourteenth Amendment rights by introducing rebuttal evidence of defendant's lucid conversation about the scope of his Miranda rights when he was interviewed shortly after the murders. This was introduced after defendant introduced evidence of his lack of contact with reality immediately before and after the Miranda warnings. People v. Stack, 128 Ill. App. 3d 611, 470 N.E.2d 1252 (1st Dist. 1984). The State petitioned the Illinois Supreme Court for leave to appeal, and the case was argued in September 1985. Finding the intervening decision of

this Court in Wainwright v. Greenfield, 106 S. Ct. 634 (1986), to be "dispositive," the Illinois Supreme Court on May 12, 1986, affirmed the decision of the Appellate Court, holding that it was "fundamentally unfair" and hence violative of the Fourteenth Amendment to introduce evidence of "post-Miranda silence" in order to rebut an insanity defense.

At 12:30 p.m. on the afternoon of Mother's Day, May 11, 1980, Carol's mother spoke to defendant over the telephone and could hear her daughter speaking normally in the background. (R. 241-42) At 1:30 p.m. she went to defendant's house and found it locked and silent. (R. 243) At 2:50, police found defendant leaning out a window shouting, "I've been looking for you. I just killed my wife and baby." (R. 262-63) Carol died of stab and slash wounds inflicted with a broken pool cue. (R. 198, 206) The baby was apparently flung against a wall and died of a fractured skull. (R. 209) With no witnesses to the killings, defendant relied upon testimony concerning his behavior before and after the crime in order to show that at the time, he lacked "substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law." Ill. Rev. Stat. (1981) ch. 38, par. 6-2.

During the State's case-in-chief, testimony established that defendant drank heavily, had been fired from his last job six months earlier, and was supported by his wife's family. (R. 229, 230) The arresting officers testified that defendant appeared coherent, recognized them as police, and complied with their directives. (R. 273-74, 303) One officer testified without objection that defendant understood each of the Miranda warnings given before defendant was removed from his house. (R. 301-02) Defendant was taken directly to a hospital for treatment of cuts to his hands sustained while killing his wife and child with the broken pool cue. According to the officer who remained with defendant at the hospital between 3:15 p.m. and 6:00 p.m. when defendant was transferred to a police lock-up (R. 304), defendant talked about God and demons only when hospital personnel were present (R. 320). A detective spoke with defendant at the hospital, and gave him the Miranda warnings. (R. 339) He testified without objection that defendant stated that he understood each right (R. 240), and then explained that there was evil in the world and that he fought the demons coming from his wife and child (R. 341-42).

During the defense portion of the case, the emergency room physician testified that defendant responded to medical history questions with "Go ask the Pope." (R. 465) Although defendant's hand was not anesthetized, he winced only once during eleven stitches; he explained, "It's not my hand." (R. 371) The parish priest arrived at the hospital about 5:30 p.m., and found defendant talking about the wickedness and evil in the world, and about a mission. (R. 474) Two defense psychiatrists testified. One saw defendant one month after the murders, and again six months later; the other interviewed defendant 18 and 22 months afterwards. Defendant knew that he was being interviewed for determination of fitness and sanity. (R. 646) Both psychiatrists offered the opinion that defendant was a paranoid schizophrenic who suffered a total break with reality on the afternoon of Mother's Day, 1980. (R. 541, 635) One psychiatrist testified as to defendant's description of the murders: he killed his wife after "fighting the demons for three hours," and then killed his son when he realized that the child too was "possessed." (R. 637, 644) The Catholic chaplain at the Cook County Jail saw defendant three days after the murders and considered him "very bizarre". (R. 494) The defense also presented evidence of a number of odd

occurrences during the weeks prior to the murders. Defendant told others that he could predict the stock market (R. 442) and solve the energy crisis (R. 441), and that he was concerned about evil and received communications from God (R. 496-504). Once when playing pinochle, defendant's cards were out of order, and he made an inappropriate bid. (R. 451) Defense witness further testified that defendant drank heavily and did not support his family. (R. 456-57, 513)

In rebuttal, the State introduced evidence concerning defendant's conversation at approximately 5:00 p.m. at the hospital when an Assistant State's Attorney came to interview him, and gave him the Miranda warnings. As the Assistant gave each of the Miranda provisions, defendant stated that he understood each right. (R. 787-88) Defendant then asked what would happen if he chose not to say anything. The Assistant replied that in that case, he would not ask any questions. Defendant responded, "Then that's the way I want it," and the interview terminated. (R. 788) The State also introduced rebuttal evidence that while defendant was held for psychiatric examination prior to trial, he inquired about the criteria psychiatrists use to diagnose insanity (R. 581, 614, 842), discussed the pros and cons of remaining longer at the

psychiatric facility in order to help his defense (R. 582), and stated that he was glad that Richard Daley had been elected State's Attorney (of Cook County, Illinois) because Mr. Daley was reputed to be easier on the mentally ill (R. 589). A psychiatrist testifying for the state examined defendant 16 and 22 months after the murders, and reviewed police and psychiatric reports. (R. 833-34) He found "absolutely no evidence" of any mental disease prior to May 11, 1980, and "never" any indication of schizophrenia. (R. 835) It was established that on the afternoon of May 11, defendant had made plans to take his child fishing with a friend although he was expected at a 3:00 p.m. Mother's Day party at his in-law's house. (R. 504, 510) The State also introduced testimony showing that defendant had a history of being physically abusive to his wife (R. 809-10), and was at best indifferent to the child; once when the child required emergency room treatment, defendant refused to go to the hospital, saying he was in the midst of a basketball game. (R. 731) Shortly before the murders, Carol threatened to return to work if defendant was unwilling to support his family. (R. 590) Two days before the murders, Carol finally threated to leave defendant; he replied, "Yes, try it. I'll find you." (R. 814)

REASONS FOR GRANTING THE WRIT

I.

UNDER THE STANDARDS OF DOYLE V. OHIO AND WAINWRIGHT V. GREENFIELD, EVIDENCE OF DEFENDANT'S LUCID CONVERSATION CONCERNING HIS MIRANDA RIGHTS WAS PROPERLY ADMITTED IN REBUTTAL TO COUNTER HIS INTRODUCTION OF TESTIMONY REGARDING HIS BIZARRE BEHAVIOR IMMEDIATELY BEFORE AND AFTER THE MIRANDA WARNINGS AS EVIDENCE THAT HE WAS TOTALLY OUT OF CONTACT WITH REALITY AT THE TIME OF THE MURDERS A FEW HOURS EARLIER.

The Illinois Supreme Court found reversible error under Wainwright v. Greenfield, 106 S. Ct. 634 (1986), in the admission of testimony and argument concerning defendant's lucid conversation about the scope of his Miranda rights, Miranda v. Arizona, 384 U.S. 436 (1966), with an Assistant State's Attorney who interviewed him at the hospital shortly after the murders. (No issue was raised about police testimony during the State's case-in-chief that defendant comprehended the Miranda warnings.) Defendant stated that he understood each provision, and then asked what would happen if he chose not to say anything. The Assistant replied that in that case, he

would not ask any questions. Defendant responded, "Then, that's the way I want it," and the interview terminated. This testimony was introduced in the course of cross-examination of the final defense witness (a psychiatrist) (R. 659), and during the rebuttal portion of the case (R. 787-88). During closing argument the prosecutor argued that in view of this interchange, defendant could hardly "tell you that he didn't understand where he was, that he was out of touch with reality on that date." (R. 899) This testimony was introduced in rebuttal after the defense, seeking to establish that defendant suffered "a major break with reality" at the time he committed the murders, had introduced evidence that defendant made bizarre remarks to the emergency room physician immediately prior to the interview with the State's Attorney, and talked to his parish priest about evil and demons within minutes thereafter.

In characterizing defendant's conversation about his rights as "post-Miranda silence" barred under Doyle v. Ohio, 426 U.S. 610 (1976), and Greenfield, the Illinois Supreme Court has substituted a catch phrase for any analysis of the meaning of "silence" or "post", and fails to consider the implications of the fact that "Miranda" necessarily requires some conversation

between defendant and the interviewer prior to the exercise of any "post-Miranda" choice. In so doing, the Illinois Supreme Court has ignored the logic of Doyle and Greenfield, and by insulating evidence of defendant's bizarre behavior from impeachment with contemporaneous evidence of his lucidity at the time defendant carefully ascertains his constitutional rights, openly invites the fabrication of an insanity defense.

Although the defense was legally phrased in the bloodless language of the "lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law" standard, it was factually presented in terms of a total break with reality; defendant claimed that he thought he was killing two demons. It must have taken some length of time before defendant inflicted enough wounds with the broken pool cue to bring about his wife's death. One imagines that the victim was screaming. Defendant in effect claims that he was so out of touch with reality that he could not recognize the cries of another human being. Yet, immediately after the murders, defendant could respond intelligibly and intelligently to the words of the Assistant State's Attorney, and apparently understood him to be a law enforcement official. Defendant could ask a clear,

pertinent question, and could announce a decision to terminate the interview. This instance of coordinated, appropriate, social interaction occurred only two hours after defendant was taken into custody, and well before any defense psychiatrist informed him that he was being interviewed concerning fitness and sanity, and before anyone provided advice about establishing an insanity defense.

In finding defendant's rational discussion of the Miranda warnings to be inadmissible, the Illinois Supreme Court has taken a slice out of time—leaving for the jury's consideration the instances of defendant's bizarre post-arrest behavior, but precluding knowledge of defendant's capability for rational and appropriate social interaction. Defendant cannot have it both ways—proceeding in parallel as an insane defendant whose crazy remarks are for the record, and as a sane defendant whose sensible queries concerning his constitutional rights remain forever off the record. The Illinois Supreme Court's decision not only encourages the fabrication of an insanity defense, but guarantees the State's assistance in maintaining confidentiality of the charade.

Under Illinois law, insanity is an affirmative defense, Ill. Rev. Stat. (1981) ch. 38, pars. 3-2, 6-2, 6-4, and

under the law in effect at the time of the offense, it is the State's burden to prove defendant sane beyond a reasonable doubt once he has raised some reasonable quantum of evidence of insanity. People v. Gold, 38 Ill. 2d 510, 232 N.E.2d 702 (1967). As Judge Posner, writing for the Seventh Circuit in Sulie v. Duckworth, 689 F. 2d 128, 130-31 (7th Cir. 1982), pointed out, this is a "burden some might think virtually impossible to carry in any case of criminal, which implies aberrant, behavior." Logically, any and all evidence should be admissible on the question of sanity. See 2 Wigmore, Evidence sec. 228 (Insanity as Evidenced by Conduct) (Chadbourne rev. 1979):

> The first and fundamental rule, then, will be that any and all conduct of the person is admissible in evidence. There is no restriction as to the kind of conduct. There can be none, for if a specific act does not indicate insanity it may indicate sanity. It will certainly throw light one way or the other upon the issue. (emphasis in original)

By the usual criteria of admissibility, there is no question but that the rebuttal testimony concerning defendant's lucidity at

th

ev

Su

im

ad

wi

in

Gr

to

en

Ct

de

ch

ad

Je

ad

v.

de

the

Do

time of the Miranda warnings is relevant, probative ience.

The remaining question is whether, as the Illinois reme Court concluded, there is some constitutional edim ent to the introduction of otherwise highly relevant and issible evidence. This evidence is barred only if it falls hin the rule of Doyle v. Ohio, 426 U.S. 610 (1976), as applied the context of an insanity defense in Wainwright v enfield, 106 S. Ct. 634 (1986).

As first noted by Justice Stevens in his concurrence the Doyle decision, 426 U.S. at 620, and now explicitly orsed by the majority in Wainwright v. Greenfield, 106 S. 634 (1986), Doyle v. Ohio is fundamentally an estoppel ision. Estoppel in turn implies that silence (or other ices) not induced by the Miranda warnings should be issible. This is indeed the position taken by this Court in kins v. Anderson, 447 U.S. 231 (1980) (pre-arrest silence issible to impeach exculpatory trial testimony) and Fletcher Weir, 455 U.S. 603, 606 (1982) (failure to mention self- ense at time of arrest admissible for impeachment because record contained no mention of Miranda warnings, and le bars only "government-induced silence").

In Greenfield, defendant was charged with the sexual assault of a woman on a Florida beach. He pled not guilty by reason of insanity—specifically, an inability to distinguish right from wrong. In its case-in-chief, the prosecution introduced police officers' testimony that on three occasions defendant requested a lawyer after being advised of his Miranda rights, and thereafter refused to talk (the repeated interrogation being now, of course, barred by Edwards v. Arizona, 451 U. 477 (1981)). The defense, and the State in rebuttal, introduced psychiatric testimony concerning whether defendant's reaction to Thorazine given during the period he awaited trial indicated that he was a paranoid schizophrenic. No issue was raised as to defendant's behavior at the time of arrest. In closing, the prosecutor argued that defendant's request for an attorney and election of silence indicated both guilt and sanity. Greenfield v. Wainwright, 741 F. 2d 329, 331 (11th Cir. 1984). This Court held that prosecutorial comment on defendant's refusal to make a statement was impermissible under Doyle v. Ohio; the State of Florida had breached its implied assurance that defendant would not be penalized for exercising his right not to speak. Wainwright v. Greenfield, 106 S. Ct. 634 (1986).

This estoppel rationale of Doyle and Greenfield poses a very interesting problem for an insanity defense. If defendant Stack were as totally out of touch with reality as he claims, then the Miranda warnings should have been completely ineffective for communicating any promise by the government. By asserting post-arrest insanity, defendant has implicitly waived reliance on Miranda; or, to put it the other way around, a claim of reliance on the promises of Miranda is tantamount to a concession of post-arrest sanity. Of course, this argument only holds when the particular variety of insanity asserted involves a lack of comprehension—as in the situation presented here. In other cases, rationality might be perfectly consistent with the particular mental problem on which the defense is based. Analysis of this problem has been impeded by courts' use of "insanity" as a unitary construct rather than a catch-all label encompassing a variety of mental problems that might negative the requisite intent. See, e.g., United States v. Emery, 682 F. 2d 493 (5th Cir. 1982) (defendant able to distinguish right from wrong, and capable of rational planning, but allegedly under a compulsion to obtain money by robbing federally insured banks); Commonwealth v. Mahdi, 388 Mass. 679, 448 N.E.2d 704 (1983) (defendant allegedly under stress because he feared

excommunication from his Moslem community for failure to support his family) (cited in Wainwright v. Greenfield, 106 S.Ct. 634, 641 n.14 (1986).) Defendant Greenfield similarly claimed only that he was unable to distinguish right from wrong; there was no suggestion that he had any problem with reality contact, and there was no testimony concerning his behavior at the time of his arrest. Greenfield v. Wainwright, 741 F. 2d 329, 331 (11th Cir. 1984).

The State of Illinois believes that when the present case is viewed in terms of the estoppel analysis developed in Doyle and its successors and in Wainwright v. Greenfield, 106 S.Ct. 634 (1986), there is no constitutional bar to the admission of testimony concerning defendant Stack's comprehension of the Miranda warnings. The Illinois Supreme Court failed to apply the analysis developed in Doyle and Greenfield, and erred in extracting from Greenfield a blanket rule that any testimony connected with the Miranda warnings is inadmissible on the question of sanity.

When he is given the Miranda warnings, defendant is explicitly offered a number of choices ("You have the right to remain silent;" "You have the right to a lawyer, and one will be appointed if you are without funds.") Doyle and Greenfield both

stand for the proposition that once the government has informed defendant that he has these options available, it is unfair to turn defendant's exercise of such option against him. There are two closely related but distinguishable concerns here. First, is the detrimental reliance point; the government cannot renege on an implicit promise that there will be no penalty attached to the exercise of the constitutional rights listed in the Miranda warnings. Second is the idea of "trickery," in that the choice exercised may have been "procured" by the very act of giving the Miranda warnings.

Both concerns were at issue in Doyle and Greenfield. First, it was the meaning of the choice exercised that was emphasized by the prosecution ("If defendant had really been framed, he'd have mentioned it earlier"), and second, defendant's choice was procured in the sense that it might not have been made absent the Miranda warnings (explaining oneself seems to be the natural impulse and an explicit warning about the perils of talking is often necessary before a defendant will remain silent). The present case differs on both dimensions. First, the focus was on defendant Stack's capacity for rational comprehension at the time he was given the Miranda warnings rather than on the choice made

subsequently. His decision—to decline to give a statement—was not of particular interest (especially in view of his statement to the arresting officers that he had just killed his wife and child). Rather, the point is that defendant, who claimed to have perceived two demons only a few hours earlier, could recognize the prosecutor as such and ask sensible questions about his constitutional rights. (It may also be noted that because defendant Stack asserted that he was incoherent, evidence of his rationality is more analogous to physical evidence than to testimonial evidence which necessarily reflects a capacity for choice. See Schmerber v. California, 384 U.S. 757 (1966) and South Dakota v. Neville, 459 U.S. 553 (1983).)

Second, despite the Illinois Supreme Court's reference to the "Siren's song" of Miranda, the State in no way "tricked" defendant into uttering statements that could be used against him. (The Illinois Supreme Court apparently agrees that there is no compulsion and hence no Fifth Amendment issue here; the Appellate Court relied on the Fifth Amendment as well as the due process clause of the Fourteenth. 128 Ill. App. 3d at 618, 470 N.E.2d at 1257.) Neither can the giving of the Miranda warnings itself be characterized as interrogation; the warnings are more analogous to "words or actions . . . normally

attendant to arrest and custody." See Rhode Island v. Innis, 446 U.S. 291, 301 (1980). The State is required to give the Miranda warnings prior to any conversation, and if any subsequent statement is to be introduced into evidence, the State must establish that defendant understood those rights and knowingly waived them. Tague v. Louisiana, 444 U.S. 469 (1980). Thus under certain circumstances, the State would be required to introduce the evidence whose introduction here was found to be reversible error. (This anomaly only underscores the propriety of the State's conduct in giving the Miranda warnings.) The Illinois Supreme Court is apparently implying that there is "trickery" involved unless a wall of silence is maintained around defendant. Such a holding necessarily implies a radical expansion of the rights protected by Miranda v. Arizona, 384 U.S. 436 (1966). For this reason alone, the State believes that the Illinois Supreme Court erred in finding Greenfield "dispositive;" neither Doyle nor Greenfield even addresses the evidentiary use of defendant's comprehension of the Miranda warnings.

Even more crucial for purposes of determining the precedential effect of Wainwright v. Greenfield, 106 S.Ct. 634 (1986), is the "shield for perjury" problem raised in the Eleventh

Circuit's decision in Greenfield. Rejecting the use of post-Miranda silence and request for an attorney as evidence of sanity under the circumstances presented, it left open the possibility that "silence might appropriately be used to impeach on cross-examination a defense psychiatrist who raised defendant's behavior with police at the time of or after his arrest and Miranda warnings as evidence of insanity." Greenfield v. Wainwright, 741 F.2d 329, 326 n.9 (11 Cir. 1984). This is precisely the situation presented here. This Court too alluded to the possibility that the Doyle rule might not apply if Miranda were to be used as a "shield for perjury." Wainwright v. Greenfield, 106 S. Ct. 634, 639 n.8 (1986). Prior decisions have underscored this Court's concern about allowing Miranda to be used as a shield for perjury. See, e.g., Oregon v. Hass, 420 U.S. 714, 722 (1975) ("(T)he shield provided by Miranda is not to be perverted to a license to testify inconsistently, or even perjuriously, free from the risk of confrontation with prior inconsistent utterances."); Harris v. New York, 401 U.S. 222 (1971). Similar concerns have long been voiced about the possible misuse of the privilege against self-incrimination. As Judge Learned Hand put it in United States v. St. Pierre, 132 F. 2d 837, 840 (2d Cir. 1984), "It must be conceded that the

privilege is to suppress the truth, but that does not mean that it is a privilege to garble it; . . . it should not furnish one side with what may be false evidence and deprive the other of any means of detecting the imposition."

Defendant Stack has in effect testified, albeit without taking the stand, and does not have the right to garble the truth by preventing the introduction of his rational behavior immediately after the murders. His family and friends related odd remarks made prior to the murders, and his psychiatrists relayed his account of fighting the demons for three hours before ultimately killing his wife and child. A doctor and priest reported the bizarre remarks defendant made at the hospital immediately after the murders. Defendant has thus placed his entire version of his interior state of mind—the only real issue at trial—before the jury without being put to his oath or tested by cross-examination. Of course the various defense witnesses were subject to cross-examination, but a question along the lines of "Did defendant <u>really</u> say that?" scarcely gets at the heart of the matter. (As a practical matter, an insanity defense is raised only through testimony by proxy: if defendant were in a condition to take the stand to provide demonstrative evidence of his irrationality, he would be unfit for trial; if

defendant were perfectly lucid at trial, defense strategy would preclude undercutting the defense by putting him on the stand.)

Although all defendant's statements to his psychiatrist are technically admissible because they provide a basis for the expert's conclusion about sanity, defendant's statements, as recited by the psychiatrist, in fact function as testimony about what really happened. The practical effect of this testimony by proxy is illustrated by the statement of facts included in the Illinois Appellate Court decision, 128 Ill. App. 3d at 612, 470 N.E.2d at 1253:

> The record discloses that on May 11, 1980, defendant murdered his wife by repeatedly kicking her in the head, stabbing her with a pool cue and then slashing and mutilating her body. After murdering his wife, defendant threw his 13-month-old son against a wall, fracturing the infant's skull. Defendant then repeatedly stabbed the baby with the same pool cue he used in murdering his wife.

The sole evidence for this sequence of events is defendant's statement to his psychiatrist. (R. 637) However, both the

physical evidence and testimony about the relationship between defendant and his wife, and the other events of Mother's Day suggest that it was the infant who was murdered first. The jurors could well have concluded that an argument over defendant's attempt to take the child on a fishing trip instead of to the scheduled Mother's Day party ensued early in the afternoon, and that defendant grabbed the child and ultimately flung him against the wall. A photograph, which went to the jury, shows Carol's hand outstretched, almost touching the baby's hand, making it rather more plausible that she died reaching out to the dead infant than that the child was killed second and by chance dropped in this position.

This Court in Greenfield recognized "the State's legitimate interest in proving that the defendant's behavior appeared to be rational at the time of his arrest . . . ." 106 S. Ct. at 640. The key question is how this is to be accomplished. (In this case, defendant Stack carefully and consistently uttered only irrelevancies when speaking to hospital personnel and his parish priest; only when he needed information from the prosecutor about his rights was he forced to drop the pretense of craziness.) This Court went on to make the observation that the State's interest could be served "by carefully framed

questions that avoided any mention of the defendant's exercise of his constitutional rights to remain silent and to consult counsel." Id. This must be a reference to the framing of the questions put to the witness who testifies about defendant's ability to engage in rational conversation. It cannot refer to the questions initially put to defendant at the time of his arrest; the Miranda warnings must be given prior to any conversation, and Edwards v. Arizona, 451 U.S. 47 (1981), precludes further conversation once defendant has requested counsel. There is no time at which the police may engage defendant in idle conversation for the purpose of eliciting responses indicating lucidity. If this Court means that in-court reference to the Miranda warnings is to be avoided, then questions must indeed be carefully framed to avoid a "conclusory" objection. Even more problematic is the rationale behind this requirement. It is the breach of the promise implicit in the Miranda warnings that is proscribed by Doyle and Greenfield, and the breach is not lessened by avoiding any mention of Miranda.

In the case at bar, defendant was given the Miranda warnings in an interview that was an absolute model of the proper application of the Miranda decision--and defendant has

never contended otherwise. The State of Illinois urges this Court to reverse the decision of the Illinois Supreme Court holding that it was so "fundamentally unfair" that "defendant's trial did not comport with the requirements of due process" for the State to introduce evidence of defendant's rational comprehension of those Miranda warnings to rebut defendant's evidence of his irrationality immediately before and after the interview. While there are indeed situations in which the truth-seeking function of a trial is properly sacrificed for the sake of some greater goal (as, in the Fourth Amendment context, deterring police conduct which itself offends the Constitution), this is not one of them. It hardly offends civilized notions of a fair trial for defendant to be caught out in the fabrication of an insanity defense. We have gone far afield indeed from the due process clause it if is construed to require the State's facilitation of an insanity defense free from impeachment by probative evidence obtained without coercion and in full compliance with all of this Court's requirements governing custodial interrogation.

II.

ANY ERROR IN THE INTRODUCTION OF DEFENDANT'S QUESTIONS ABOUT HIS Miranda RIGHTS WAS HARMLESS.

Assuming that the State's rebuttal use of defendant's lucid questions about his Miranda rights is error under Miranda v. Arizona, 384 U.S. 436 (1966), Doyle v. Ohio, 426 U.S. 610 (1976), and Wainwright v. Greenfield, 106 S. Ct. 634 (1986), the State urges that any error be held harmless.

The Illinois Supreme Court did not address the matter of harmless error, although the issue was argued by both defendant and the State in supplemental briefs filed after Wainwright v. Greenfield was decided. Instead, the Court simply announced that Greenfield was "dispositive" and concluded that it was "fundamentally unfair" to use "post-Miranda silence" against defendant.

This approach ascribes a talismanic significance to the Miranda warnings under which any violation constitutes automatic reversible error regardless of the importance of the error in the context of the entire trial. There is no basis for this conclusion to be found in the decisions of this Court, and the Illinois Supreme Court—offering no analysis at all—did not

BEST AVAILAB

propose it as a separate, more stringent Illinois standard. Although this Court has yet to be presented with the question, it has gone out of its way to indicate that violations of Doyle are potentially harmless. The original Doyle decision, 426 U.S. 610, 620-21 (1976), concluded with the statement that the "State has not claimed" that the use of post-Miranda silence for purposes of impeachment "in the circumstances of this case might have been harmless error. Accordingly, petitioners' convictions are reversed . . . ." (emphasis added) The Eleventh Circuit in Greenfield specifically found that the introduction of defendant's election of silence and request for counsel could not be harmless error, Greenfield v. Wainwright, 741 F. 2d 329, 336 (11th Cir. 1984), and the State of Florida in its petition for writ of certiorari conceded the point. This Court nevertheless volunteered the information that the Florida Attorney General eschewed any harmless error argument. Wainwright v. Greenfield, 106 S.Ct. 634, 640 n. 13 (1986).

It strains belief to argue that defendant Richard Stack would have—or even conceivably might have—been acquitted absent the introduction of testimony concerning his lucid conversation about the Miranda warnings. This conversation, although highly probative of his contact with

LE COPY

reality at a time immediately after the murders, was far from being the State's only evidence of defendant's sanity, and may well have seemed significant only to a lawyer or psychologist. From the jury's point of view, the 10-day (980-page record) trial was more likely dominated by the extensive and emotionally-loaded evidence of defendant's motive and intent to commit murder, and his attempts to construct an insanity defense after the fact. Suffice it to note here that there was extensive evidence of defendant's hostile and abusive treatment of his wife and callousness towards the child, a refusal to support his family coupled with financial reliance on his in-laws, and an adolescent lifestyle involving fishing, fixing cars, playing cards, basketball, and hanging out at the local fieldhouse. Two days before the murders, his wife finally threatened to leave; he replied "Try it. I'll find you." The jury could well conclude that the murders were triggered by Mother's Day—a day celebrating his wife's fulfillment of her role, and so clearly pointing up defendant's own inadequacies. While held at a psychiatric facility prior to trial, defendant also asked questions about the symptoms psychiatrists use to diagnose insanity, and discussed remaining longer as a means of bolstering his insanity defense. All this evidence was characterized as "overwhelming" by the

dissenter on the three-judge Illinois Appellate Court. And, of course, the jury had the opportunity to view defendant and observe his demeanor during the course of the trial. Given the evidence, it seems highly unlikely that the brief and emotionally-neutral testimony about the Miranda warnings was outcome-determinative, especially in view of the fact that a defense psychiatrist testified that this information did not change his opinion about defendant's insanity "one iota." (R. 660)

As to the standard for determining whether a Doyle error is harmless, the question was not considered by the Illinois Supreme Court, and no case has yet required this Court to decide the matter. A related question is presented in a petition for writ of certiorari now pending in another Illinois case, State of Illinois v. Charles Miller. See United States ex rel. Miller v. Greer, 789 F. 2d. 438 (7th Cir. 1986) (en banc). In Miller—as in the original Doyle decision—post-Miranda silence was introduced to impeach a later exculpatory statement. For purposes of the petition for writ of certiorari, the State of Illinois concedes a Doyle violation in Miller, but questions whether the standard for harmless error on collateral review of a habeas corpus petition should be the "harmless beyond a

reasonable doubt" standard of Chapman v. California, 386 U.S. 18 (1967), or the less stringent standard identified in Donnelly v. DeChristoforo, 416 U.S. 637 (1974), for violations of rights not specifically enumerated in the Bill of Rights.

Given the evidence in this case, the State believes that the question of the applicable standard need not be reached; any Greenfield violation is harmless even if the "beyond a reasonable doubt" standard of Chapman is applied. The State does, however, believe that for the reasons set forth in Judge Easterbrook's dissent in Miller, 789 F.2d at 448, the Donnelly v. DeChristoforo, 416 U.S. 637 (1974), standard is more appropriate for any violation of Wainwright v. Greenfield, 106 S.Ct. 634 (1986)—a decision extending Doyle v. Ohio, which states a procedural rule designed to effectuate Miranda v. Arizona, 384 U.S. 436 (1966), which is in turn a prophylatic rule designed to protect a constitutional right.

III.

WAINWRIGHT V. GREENFIELD SHOULD NOT BE APPLIED RETROACTIVELY TO REVERSE THE OUTCOME OF A TRIAL CONDUCTED FOUR YEARS EARLIER.

Although the Illinois Supreme Court explicitly applied this Court's decision in Wainwright v. Greenfield, 106 S. Ct. 634 (1986), retroactively, the State does not pose the retroactivity issue here as whether or not a decision of known dimension should be given retroactive effect. A preliminary question must be answered first. As stated above, the State of Illinois believes that the Illinois Supreme Court erred in abstracting from the Greenfield decision a general rule of automatic per se reversibility whenever any response associated with the Miranda warnings is used to rebut an insanity defense. If the State is correct in its interpretation of Doyle v. Ohio, 426 U.S. 610 (1976), and Greenfield, then retroactive application is not an issue; Greenfield is to be understood as another case in the line of Fletcher v. Weir, 455 U.S. 603 (1982), Anderson v. Charles, 447 U.S. 231 (1980), Jenkins v. Anderson, 447 U.S. 404 (1980), and applying the Doyle principles to a variety of fact patterns. The facts of the Greenfield and Stack cases are

quite different, and the logic of Greenfield supports the State's position even as the facts are distinguishable. If, on the other hand, this Court indeed meant to promulgate the broad expansion of Miranda v. Arizona, 384 U.S. 436 (1966), perceived by the Illinois Supreme Court, then Greenfield becomes not merely another incremental exploration of the permutations of Doyle, but a clear break with prior precedent. In such case, the State urges this Court to give only prospective effect to the decision. (The Illinois Supreme Court explicitly rejected the State's argument that Greenfield, so interpreted, should not be applied retroactively.)

This Court has had numerous occasions to consider when a new constitutional rule of criminal procedure is to be applied retrospectively. (Indeed, as Justice Blackmun, writing for the majority, observed in United States v. Johnson, 457 U.S. 537, 542 (1982), each new procedural decision is typically followed by a separate decision addressing retroactivity.) In Stovall v. Denno, 388 U.S. 293 (1967), this Court set forth three criteria for determining the retroactivity of a decision: 1) the purpose to be served by the new rule, 2) the extent of reliance on prior law by law enforcement authorities, and 3) the effect on the administration of justice of retroactive application of

the new rule. These criteria were recently endorsed in Solem v. Stumes, 465 U.S. 638 (1984). A case which involves a clear break with precedent is in any event applied prospectively only. See Shea v. Louisiana, 105 S.Ct. 1065 (1985), following United States v. Johnson, 457 U.S. 537 (1982). And, of course, the Miranda decision itself was applied only to trials taking place after the date of its decision. Johnson v. New Jersey, 384 U.S. 719 (1966).

Each of the three considerations developed in Stoval v. Denno, and in Solem v. Stumes, counsels against retroactive application of Greenfield. First, "complete retroactivity is most appropriate where a new constitutional principle is designed to enhance the accuracy of criminal trials." Solem v. Stumes, 465 U.S. at 643; United States v. Johnson, 457 U.S. 537, 544 (1982). Accuracy was similarly a consideration in Shea v. Louisiana, 105 S.Ct. 1065, 1070 (1985) (retroactive application of Edward v. Arizona, 451 U.S. 477 (1981), to cases pending on direct review particularly appropriate because a Fifth Amendment violation was "likely to effect the truth-finding process"). Full retroactivity has been held appropriate in cases involving, e.g., coerced confessions, when the very coercion is likely to produce inaccurate information

and hence compromise the truth-finding function of a trial. The Greenfield ruling in no way increases the accuracy of a trial. As Justice Stevens, the author of the Greenfield opinion, observed in his dissent in Doyle, 426 U.S. at 621, the probative value of defendant's silence is not affected by the prior Miranda warnings. In this case it is 100% clear that the exclusion of defendant Stack's lucid questions about his Miranda rights would not increase the accuracy of a retrial. Exclusion here would have the sole effect of permitting defendant to introduce evidence of his irrational behavior without fear of impeachment by contemporaneous evidence of his contact with reality. A constitutional right would be turned on its head to become a shield for perjury. This is scarcely the sort of value to be promoted by retroactive application of a new constitutional rule.

The second factor to be considered is the state of the law at the time the now-objectionable conduct occurred. In this case, the relevant date is March 1982 when the Stack trial was conducted (there being nothing even arguably improper about the interview conducted by the Assistant State's Attorney on May 11, 1980). Doyle v. Ohio, 426 U.S. 610 (1976), was the only applicable United States Supreme Court precedent.

Furthermore, the Doyle decision focused on the "lack of probative value" of post-Miranda silence—surely a questionable premise (and one which the Illinois Supreme Court attempts to resurrect), as Justice Stevens noted in his dissent in Doyle, but a view not explicitly adopted by the rest of the Court until Greenfield. A judge viewing the Stack problem in 1982, and having only the guidance of Doyle, would have been struck by the probativeness—and hence admissibility—of rational conduct so much at variance with defendant's assertion of total lack of contact with reality. This incongruity would have been especially salient given the concerns about the use of Miranda as a shield for perjury expressed in Oregon v. Hass, 420 U.S. 714 (1975), and Harris v. New York, 401 U.S. 222 (1971). The State's decision to offer this evidence, and the trial judge's decision to admit it can thus hardly be characterized as a failure to anticipate an issue whose resolution was clearly foreshadowed. And the Stack case, involving not post-Miranda refusal to speak, but the Miranda conversation itself, is at yet another remove from Greenfield, which is itself a departure from the law in effect at the time of Stack's trial.

Finally, this Court must consider the effect of retroactivity on the administration of justice. There are

probably relatively few cases in which conduct connected with the Miranda warnings has been used to rebut an insanity defense (while the State has no statistics to offer, Greenfield and Stack have already been the basis for reversing one Illinois death penalty case, People v. Clifford Anderson (56043, June 20, 1986).) On the other hand, these are cases in which a retrial may be especially difficult. Sanity is not susceptible of direct proof; the case depends upon witness observations of the defendant and will be particularly vulnerable to problems of faulty memory and missing witnesses (here, more than six years have elapsed since the crime).

Assuming that this Court does indeed interpret Greenfield as permitting future defendants to take refuge behind Miranda while constructing an insanity defense, the interests of justice demand that this holding not be applied to reverse the conviction of a defendant who was interviewed in full compliance with the Miranda decision.

CONCLUSION

For all the foregoing reasons, the State of Illinois respectfully requests that a writ of certiorari issue to review the judgment of the Supreme Court of Illinois.

Respectfully submitted,

NEIL F. HARTIGAN,
Attorney General
State of Illinois
MARK L. ROTERT,
Assistant Attorney General
100 West Randolph Street
Suite 1200
Chicago, Illinois 60601

Attorneys for Petitioner.

RICHARD M. DALEY
State's Attorney
Cook County, Illinois,
500 Richard J. Daley Center
Chicago, Illinois 60602
JOAN S. CHERRY,*
THOMAS V. GAINER, Jr.,
INGE FRYKLUND,
Assistant State's Attorneys
Of Counsel

*Attorney of Record.
(312) 443-5496

Docket No. 61166-Agenda 6-September 1985.
THE PEOPLE OF THE STATE OF ILLINOIS, Appellant,
v. RICHARD STACK, Appellee.

JUSTICE SIMON DELIVERED THE OPINION OF THE COURT:

Is a defendant entitled to a new trial because the State responded to his insanity defense by introducing evidence, over objection, that the defendant exercised his right against self-incrimination after being given the Miranda warnings?

Sometime during the afternoon of May 11, 1980, Richard Stack killed his wife and infant son. Defendant admitted the killings but claimed he was insane at the time. A jury in the circuit court of Cook County rejected that defense and found Stack guilty on both counts of murder; he was sentenced to concurrent life terms for each offense. On appeal, defendant's convictions were reversed (128 Ill. App. 3d 611), and we granted the State's petition for leave to appeal in accordance with Supreme Court Rule 315 (94 Ill. 2d R. 315).

The State contends that the appellate court erred in finding that prosecutors denied the defendant a fair trial by commenting on his exercise of the right to remain silent. After the defendant was arrested, he was taken to a hospital by the arresting officers for treatment of injuries sustained during the

homicides. Defendant introduced evidence at trial that he made bizarre, disconnected statements to doctors and hospital personnel. In response, the State elicited the following testimony regarding defendant's conversation with an assistant state's attorney.

> "Q. (Assistant State's Attorney) Now, you said that Mr. Stack couldn't perceive reality on that day. Does it indicate in this document, doctor, that Mr. Bredeman, the state's attorney, went to the hospital and informed Stack of his right, pursuant to Mirando (sic), to each one he asked him if he understood and he replied he did. When he finished informing him of his rights, Richard Stack asked what would happen if he chose to remain silent. "I told him I wouldn't ask him any questions,' And (sic) said that is what he wanted.
>
> MR. KULL (defense attorney): Objection...
>
> MR. KULL: Well, Judge, can I have a sidebar?
>
> THE COURT: No overruled.
>
> MR. KULL: I make a motion for a mistrial.

THE COURT: Denied. Come on, let's go."

And later:

"Q. (Assistant State's Attorney) What did Mr. Stack say to Mr. Bredeman, tell the ladies and gentlemen of the jury?

A. (Detective Foley) Mr. Stack asked Mr. Bredeman what would happen if he chose not to say anything to Mr. Bredeman, to which Mr. Bredeman said I won't ask you any questions. Mr. Stack then said that's the way he wanted it. And the interview was stopped—

MR. KULL: Objection.

THE COURT: Overruled."

The defendant objects to this evidence as an unconstitutional burden on his exercise of the Miranda rights. Although the State acknowledges that it may not comment on defendant's silence so as to draw an inference of guilt (Doyle v. Ohio (1976), 426 U.S. 610, 49 L. Ed. 2d 91, 96 S. Ct. 2240; Griffin v. California, (1965), 380 U.S. 609, 14 L. Ed. 2d 106, 85 S. Ct. 1229), it argues here that the behavioral component of defendant's lucid response to the Miranda warnings is admissible to rebut an insanity defense.

In Doyle, the court overturned defendants' convictions because of prosecutorial comments regarding defendants' exercise of Miranda rights. That decision turns on the fundamental unfairness of penalizing a defendant for accepting a course of action which the State has invited and the inherent ambiguity in a defendant's decision to remain silent (he might simply be adopting the State's advice). The State argues that these concerns are not implicated in this case.

Contrary to the State's assertions, Richard Stack was clearly penalized for having responded to the Miranda warnings. Had he not responded, the interrogation could have continued, although any statement made by the defendant would have been inadmissible without proof that he had understood the right to remain silent and had waived that right. (Tague v. Louisiana (1980), 444 U.S. 469, 62 L. Ed. 2d 622, 100 S. Ct. 652.) Since, in view of Tague, a defendant can end interrogation only by making an overt response, exercise of the right is clearly penalized if the State can use such a response to establish defendant's lucidity and, therefore, his culpability. For this reason, the use of defendant's Miranda response "cuts down on the privilege by making its assertion costly" and is violative of the fourteenth amendment. Griffin v. California

We are urged by the State not to apply Greenfield "retroactively" to this case because it was an unforeseeable extension of Doyle (although Doyle itself applies retroactively to cases on direct appeal (Phelps v. Duckworth (7th Cir. 1985), 757 F.2d 811)) and because it will prejudice the State's case to be forced to retry the defendant's culpability four years after the original trial (Solem v. Stumes ((1984), 465 U.S. 638, 79 L. Ed. 2d 579, 104 S. Ct. 1338). How the State could appeal from an adverse ruling in the appellate court and then argue that inevitable delays in the appeal process have so prejudiced its case as to require reversal of the appellate court decision is difficult to understand. Furthermore, we do not agree with the State's characterization of Greenfield as an unexpected extension of Doyle; the court did no more in Greenfield than apply the rules set forth in its previous opinions.

> "The point of the Doyle holding is that it is fundamentally unfair to promise an arrested person that his silence will not be used against him and thereafter to breach that promise by using the silence to impeach his trial testimony. It is equally unfair to breach that promise by using silence to

> overcome a defendant's plea of insanity. In both situations, the state gives warnings to protect constitutional rights and implicitly promises that any exercise of those rights will not be penalized. In both situations, the State then seeks to make use of the defendant's exercise of those rights in obtaining his conviction. **The implicit promise, the breach, and the consequent penalty are identical in both situations."** (Emphasis added.) Wainwright v. Greenfield (1986), 474 U.S. ___, ___, 88 L. Ed. 2d 623, 630-31, 106 S. Ct. 634, 639.

Greenfield merely fleshes out the Doyle rule and applies it where necessary to avoid a fundamentally unfair trial. Solem v. Stumes (1984), 465 U.S. 638, 79 L. Ed. 2d 579, 104 S. Ct. 1338, cited by the State, inapposite. In Solem the court determined that the per se rule of Edwards v. Arizona (1981), 451 U.S. 477, 68 L. Ed. 2d 378, 101 S. Ct. 1880, did not apply to cases on collateral review. Unlike Greenfield, Edwards merely adopts a prophylactic rule to prevent certain Miranda violations; "Edwards did not confer a substantive constitutional right." (Solem v. Stumes (1984), 465 U.S. 638, 644 n.4, 79 L. Ed. 2d 579, 588 n.4, 104 S. Ct. 1338, 1342 n.4.) But Greenfield

applies a recognized substantive right which shows that the defendant in this case did not receive the fair trial to which he was entitled. Since Greenfield simply applies "settled precedents to new and different fact situations," there is no question but that it governs this case. United States v. Johnson (1982), 457 U.S. 537, 549, 73 L. Ed. 2d 202, 213, 102 S. Ct. 2579, 2586; see Shea v. Louisiana (1985), 470 U.S. ___, 84 L. Ed. 2d 38, 105 S. Ct. 1065 (reasoning of Johnson applies to fifth amendment cases, so Edwards v. Arizona retroactively governs cases on direct review).

Prior to the court's decision in Greenfield, the State had not argued for reversal of the appellate court's decision on the ground that it was an erroneous application of retroactive law; indeed, the State could not have argued retroactivity since the case was before the appellate court on direct appeal. The common law rule for both civil and criminal cases requires legal rulings to "be given effect while a case is on direct review" (Linkletter v. Walker (1965), 381 U.S. 618, 627, 14 L. Ed. 2d 601, 607, 85 S. Ct. 1731, 1736). Now that the supreme arbiter of Federal constitutional law (see Atkins v. Atkins (1944), 386 Ill. 345, 347) has agreed with the conclusion reached by our appellate court in this case, the State asks this court to reverse

the appellate court's decision, not despite the Supreme Court's endorsement, but because of that endorsement. There is no logic in the State's position that an appellate court opinion we know to be correct as a matter of law, and which we would otherwise affirm, must now be reversed because, during the pendency of this appeal, the United States Supreme Court has agreed with a legal doctrine announced by our appellate court. Wainwright v. Greenfield (1986), 474 U.S. ___, ___ n.14, 88 L. Ed. 2d 623, 632-34 n.14, 106 S. Ct. 634, 641-42 n.14.

The State argues that introduction of the defendant's response is proper to show that, contrary to evidence of defendant's bizarre behavior on the afternoon in question, he was lucid and in touch with reality within moments after displaying such behavior. Hoping to distinguish Greenfield, the State claims that the defendant's decision to invoke his Miranda rights "was not of particular interest," and that the State must be allowed to admit the statement because the defendant "provided no other conversational evidence of contact with reality."

We are unfamiliar with any rule of constitutional law allowing the State to deprive an individual of his fundamental rights because the State cannot otherwise obtain a

conviction. Such a precedent would raze the foundation of American criminal procedure, and we reject the State's argument because it totally fails to distinguish Greenfield on any persuasive basis. Additionally, we question the probative value of this evidence. "Insanity is not the equivalent of stupidity." (Commonwealth v. Mahdi (1983), 388 Mass. 679, 695, 448 N.E.2d 704, 713; see M. Bleuher The Schizophrenic Disorders 496 (1978).) But Greenfield is dispositive in this case, so we need not address the ambiguity inherent in a defendant's exercise of his Miranda rights. We agree with the appellate court on this issue and conclude that the defendant is entitled to a new trial.

The appellate court also reversed the circuit court on the ground that the trial judge erred in refusing to ask the members of the venire, as requested by the defendant, whether they could return a verdict of not guilty by reason of insanity provided the evidence established that the defendant was insane at the time he killed his wife and son. Although we have already determined that the violation of defendant's fifth amendment rights requires a new trial, we consider this issue argued by the State in its appeal as it may arise again at a second trial. The State argues that the trial court properly

refused to tender defendant's voir dire questions regarding the insanity defense. Four such questions were submitted by defense counsel:

> "1. Have you or anyone close to you had any experience with a psychiatrist or psychologist?
>
> 2. Do you agree with the concept that a person should not be held responsible for his acts if he is not capable of conforming his conduct to the requirements of the law?
>
> 3. Can you find someone not guilty by reason of insanity?
>
> 4. Do you have any feeling or viewpoint concerning the defense of insanity in a criminal case? If so, what?"

Only the first question was propounded by the judge because, he said, the others were argumentative and presupposed knowledge of how the insanity defense is legally defined in Illinois.

In reversing the circuit court, the appellate court held that refusal to ask defendant's tendered insanity questions constituted an abuse of discretion. The State argues in this court that refusal to ask the last three questions was properly

within the trial court's discretion. We agree that the second and third questions are vague and improperly phrased and their rejection can be upheld for that reason. The fourth question was proper, however, and should have been put to the prospective jurors.

The State contends, on the basis of Supreme Court Rules 431 and 234 (87 Ill. 2d R. 431; 94 Ill. 2d R. 234), that the appellate court reached the wrong result with respect to all three questions. It argues that those rules prohibit inquiry into matters of law during voir dire. Rule 234, made applicable to criminal cases by Rule 431, provides in part: "Questions shall not directly or indirectly concern matters of law or instructions."

Rule 234 was promulgated to shorten voir dire by eliminating that portion of the process which did not advance the legitimate ends of impaneling an impartial jury. The rule is aimed at this specific evil since "no reason is perceived for questioning (prospective jurors) as to legal principles or concepts beyond ascertaining whether or not they are willing to accept and follow the instructions concerning the law of the case." (Emphasis added.) (People v. Lobb (1959), 17 Ill. 2d 287, 302.) The fourth question does not violate Rule 234 because it

seeks to determine only whether the prospective juror would be biased against an insanity defense. Since the question does not attempt to state the law but merely probes for bias, it cannot be faulted for containing argumentative and misleading statements of law, the abusive practice put to rest by the rule.

The State argues that the question is deficient in failing to set forth the precise legal test of insanity concerning which prospective jurors could express a viewpoint, but setting forth the law during voir dire is exactly the practice proscribed. The State also argues that jurors would not be able to answer intelligently any of the questions rejected by the trial judge because they would not know the law of insanity until instructed at the close of trial. That proposition proves too much: the State does not contend that it is improper to ask the venire members whether they will follow the law as instructed (indeed, the State says such examination is appropriate) even though they have not at the time of voir dire been instructed on any law whatsoever.

In People v. Wright (1985), 111 Ill. 2d 128, prospective jurors were asked whether they could impose the death penalty in an appropriate capital case. A majority of his court found such voir dire unexceptionable under Rule 234,

saying that "the State, in its attempt to discern the potential jurors' attitudes to the death penalty inquired if they would be able to impose the death penalty if such a sentence was supported by the law and facts. We find such questioning appropriate ***." (111 Ill. 2d 128, 158-59.) Similarly, attorneys have been allowed in dramshop actions to ask prospective jurors whether they disagreed with the dramshop statute. (Schneider v. Kirk (1967), 83 Ill. App. 3d 170.) The thread which runs through those cases is that the jury was going to be asked to apply an extraordinarily controversial legal requirement against which many members of the community may have been prejudiced. Inquiry into the feeling or viewpoint of the venire regarding such controversial legal propositions is consistent with a bona fide examination conducted so that the parties can intelligently exercise their prerogatives to challenge. Furthermore, a defendant's sixth and fourteenth amendment rights to an impartial jury (U.S. Const., amends. VI, XIV) are diminshed when jurors are prejudiced against an appropriate verdict of not guilty by reason of insanity.

The State argues that the trial judge's refusal to pose the fourth question was not erroneous because sufficient inquiry was made of the venire's willingness to apply the law as

instructed by him, and the defendant was entitled to no more. Even if voir dire had explored that question, an assertion which the record belies, we would still find an abuse of discretion. Although the insanity defense upon which the defendant relied is a well-recognized legal defense, it remains a subject of intense controversy. In People v. Bowel (1986), 111 Ill. 2d 58, 65, we described insanity as "a defense which is known to be subject to bias or prejudice." A defendant's right to an impartial jury is not therefore, protected where the sole inquiry into whether jurors will abide by the law allowing that controversial defense is the far broader and all-embracing question which the State contends was propounded in this case, namely, whether the jurors would follow the court's instructions on the law.

Just as the State is allowed to probe the venire for jurors who would not follow the law of capital punishment, the defendant should be allowed to identify and challenge those prospective jurors who would refuse to follow the statutory law of the insanity defense. As noted by the appellate court, "parties have the right to have jurors examined concerning their attitudes toward the insanity defense when such is involved in a case." People v. Robinson (1981), 102 Ill. App. 3d 884, 891;

People v. Witted (1979), 79 Ill. App. 3d 156; see United States v. Allsup (9th Cir. 1977), 566 F.2d 68; Washington v. State (Fla. App. 1979), 371 So. 2d 1108; State v. Olson (1971), 156 Mont. 338, 480 P.2d 822; State v. Sanders (1978), 161 W. Va. 399, 242 S.E.2d 554.

The appellate court found additional errors committed at trial and reversed defendant's conviction on those grounds as well. Since the State has raised only two issues on appeal to this court, we need not consider the others; the appellate court rulings on those other matters remain the law of the case. Having affirmed the appellate court decision in part on the matters appealed by The State, we remand this casue to the circuit court for further proceedings consistent with this opinion.

Affirmed and remanded.

May 12, 1986.